SUPPORTING BRIEF.

Opinions Below.

The judgment order of the District Court and its conclusions of law are found in the accompanying Record at pp. 338 and 342, respectively. The majority opinion of the court below (R. 424) and the dissenting opinion of Judge Evans (R. 436) are in the record at the pages indicated, and are reported in 129 F. (2d) 1.

Concise Statement of the Grounds on Which Jurisdiction of the Court Is Invoked.

Jurisdiction is invoked under Section 240(a), c. 229, Act of February 13, 1925; Section 1, 43 Stat. 938; 28 U. S. C. A., Section 347(a). It is also invoked on the ground that there is a conflict between the majority opinion of the Circuit Court of Appeals and Judge Evans' dissenting opinion, and that Judge Evans' dissenting opinion is a correct statement of the facts and law involved. Also upon the ground that the majority opinion is probably in conflict with applicable decisions of this Court; and that the majority opinion does not give proper effect to applicable decisions of this Court.

STATEMENT OF THE CASE.

It is believed that the statement of "Facts from the Record" (page 2, *ante*) is a sufficient statement to show the material matters up to the entering of the judgment of the District Court.

Thereafter petitioner, on July 21, 1942 (R. 343), filed its written motion under Rule 52(b) of Civil Procedure to vacate and amend this judgment, which motion was denied (R. 358).

SUMMARY OF ARGUMENT.

There has been no effective rejection of the lease, and its provisions require payment for the use made of petitioner's property.

The Bankruptcy Court exceeded its jurisdiction.

The franchise under which the lease was made is unlawfully disregarded by the judgments.

The Illinois statute law has not been observed.

The judgments below are not authorized by the Bankruptcy Act.

The ordinance and lease contract are "in the public authority."

ARGUMENT.

There Has Been No Effective Rejection of the Lease.

At the threshold, petitioner urges that the lease was in fact ratified by the respondent Trustees long before any application was made to the trial court for leave to reject it; and that the Trustees may not, therefore, reject the lease, and the decree authorizing such rejection was erroneous.

It is clearly pointed out in the dissenting opinion of Judge Evans (R. 436) that there is a limitation or condition on the right of rejection of a lease, namely, *timely* action by the Trustees. The record shows, as his dissenting opinion states, that upon the appointment of the Trustees they were ordered to continue operation of the property, assets and business of the petitioner taken over from the Receivers, who had in fact paid without objection two years and two months of rent under the lease (R. 22) before ceasing to pay rent, and never rejected the lease nor took any steps for its rejection.

Four months after the appointment of the Trustees they filed a petition asking for a reduction of the rent to a reasonable amount to be determined by the Court (R. 21). Twenty months after their appointment they amended their petition (R. 30), still asking for a reduction of the rent by the Court, or, in the alternative, that the Trustees might abandon operation of trains over petitioner's structure subject to the approval of the Illinois Commerce Commission, substituting such bus or other service as the Commission might require.

July 12, 1941, four and one-half years after the appointment of the Trustees, they filed a second amended petition (R. 324), still asking for an order requiring petitioner to reduce the amount of rental to a reasonable amount to be

determined by the Court, and, in the alternative, that the Trustees may be authorized "not to adopt but to reject said lease", and thereupon, if necessary to prevent the discontinuance of passenger service over said elevated structure until its physical abandonment is approved by proper authority, to continue the operation of such service solely for account and risk of this petitioner.

The dissenting opinion points out that it is an incongruous inconsistency to direct a lessee to remain in possession of the property and charge the deficit to the lessor, and yet call such action a cancellation; that, on the contrary, the facts show a ratification of the lease by the Receivers and by the Trustees. The dissenting opinion says (R. 439 and 440):

> "It is quite inconceivable to think of a disaffirmance of a lease, yet leaving lessee in possession of the property and operating it. * * * Believing that the right to cancel the lease was lost, and also being convinced that there never was a cancellation of this lease, but merely a repudiation of the rental obligation therein, I think it should be held that the lessee is indebted to the lessor for the rent from 1932 to the present time."

There seems no other reasonable conclusion that can be reached from the facts in this record.

The Bankruptcy Court Exceeded Its Jurisdiction.

But assuming that it was within the power of the bankruptcy court to order a disaffirmance of the lease, yet the court lacked jurisdiction to impose the affirmative liability upon petitioner to assume and pay the deficits caused by the Trustees' operation over petitioner's structure.

The principle is stated by the Circuit Court of Appeals for the Second Circuit in *Gaston* v. *Rutland Railroad Company*, 35 Fed. (2d) 685, at 687:

> "They (the receivers) not only took advantage of their ability to end an existing contract, but undertook

to make a new one on terms which they dictated. They now seek to maintain their right to name the new terms, on the ground that they were bound by law to continue to operate their trains over the bridge and land. Yet this duty to operate their trains did not carry with it the right to use property of the Rutland Railroad in so doing on terms imposed upon the owner without its consent."

In *Trustees of Dartmouth College* v. *Woodward,* 4 W. 518, the court said at 663:

> "A charter is a contract, to the validity of which the consent of both parties is essential, and, therefore, it cannot be altered or added to without such consent."

And in *Farrington* v. *Tennessee,* 95 U. S. 679, the court said at page 689:

> "We cannot so hold, without interpolating into the clause a term which it does not contain. This we may not do. Our duty is to enforce the contract as we find it, and not to make a new one."

It is submitted that the court was without power to require the petitioner to pay the operating deficits.

The Franchise May Not Be Disregarded by the Trustees.

Petitioner built the elevated structure covered by the lease in question under a mandatory ordinance passed by the City of Chicago March 16, 1903, which granted a franchise to petitioner upon condition that after the structure was built it should be permanently operated by the South Side Elevated Railroad Company (respondents' predecessor) as a part and parcel of the South Side Elevated Railroad Company. The terms of the ordinance grant were accepted by the lessee (R. 257) which operated the road until it was taken over in January, 1924 by the debtor (R. 22) which expressly assumed and agreed to pay all obligations and liabilities of the South Side Elevated Railroad Company including the obligations of this lease; and

the debtor continued the operation of the property until the Receivers of the United States District Court took it over June 28, 1932 (R. 7).

The lessees acceptance of the grant of this ordinance cannot be abandoned by it; certainly not without authority of the regulatory body—the Illinois Commerce Commission —in the manner provided by the Illinois Statutes hereinafter referred to.

In *Broad River Power Company* v. *South Carolina,* 281 U. S. 537, the court reviewed a judgment of the Supreme Court of South Carolina which directed the grantees of a franchise to continue the operation of an electric street railway system. The Broad River Power Company and the Columbia Railway Company had consolidated under an Act of the State legislature; had accepted franchises to operate an electric power system and a street railway system but sought to discontinue the operation of the railway on the grounds that it was being run at a loss and that its franchise was separate from that of the Power Company. The Supreme Court of South Carolina directed the resumption of operation of the street railway.

The opinion of this Court holds that a franchise accepted, as was the franchise in the case now presented, cannot be disregarded and abandoned by the franchise holder.

And in *Frost* v. *Corporation Commission,* 278 U. S. 515, the court said, at 519:

> "The right to operate * * * as provided by the Oklahoma statute, is not a mere license, but a franchise, granted by the state in consideration of the performance of a public service."

Hence not to be abandoned by the franchise holder.

The Judgments Violate the Statute Law of Illinois.

There is no question that debtor is a public utility subject to the regulatory jurisdiction of the Illinois Commerce Commission. This was stated in the petition for reorganization (R. 3) and in the subsequent petitions filed by debtor (R. 24, 31, 324).

The pertinent provisions of the Illinois statutes are found in Illinois Revised Statutes 1941, Chapter 111⅔. This chapter gives the Illinois Commerce Commission complete control over local utilities engaged in intrastate commerce in Illinois and requires the approval of the Commission of all changes in operating agreements and arrangements between public utilities. Chapter 111⅔, Section 49a provides:

> "No public utility shall abandon or discontinue any service without first having secured the approval of the Commission. In granting its approval, the Commission may impose such terms, conditions or requirements as in its judgment are necessary to protect the public interest."

Other sections of the statute elaborate the prohibition of Section 49a: Section 27, and Section 10.

Section 65 of the Judicial Code (U. S. C. A., Title 28, Section 124) provides:

> "Whenever in any cause pending in any Court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof."

This court has said in *Palmer* v. *Massachusetts,* 308 U. S. 79, 84-85:

> "The dependence of local communities on local railroad service has for decades placed control over their

curtailment within the regulatory authorities of the states. Even when the Transportation Act of 1920 gave the Interstate Commerce Commission power to permit abandonment of local lines when the overriding interests of interstate commerce required it, *Colorado* v. *United States,* 271 U. S. 153, this was not deemed to confer upon the commission jurisdiction over curtailments of service and partial discontinuances. *Public Convenience Application of Kansas City Southern Ry.,* 94 I. C. C. 691; see *Proposed Abandonment, Morris and Essex Co.,* 175 I. C. C. 49. *If this old and familiar power of the states was withdrawn when Congress gave district courts bankruptcy powers over railroads, we ought to find language fitting for so drastic a change.*" (Italics ours.)

The Judgments Are Not Authorized by the Provisions of Sections 77A or 77B of the Bankruptcy Act.

Section 77A, U. S. C. A., Title 11, Sec. 206 provides:

"In addition to the jurisdiction exercised in voluntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors, as provided in section 77B of this Act."

Section 77B(b) (6) (U. S. C. A., Title 11, Section 207(b) (6)) provides:

"(b) A plan of reorganization within the meaning of this section * * * (6) may reject contracts of the debtor which are executory in whole or in part, including unexpired leases *except contracts in the public authority.*" (Italics ours.)

Section 77B(e) (2) (U. S. C. A., Title 11, Section 207(e) (2)) provides:

"In case the debtor is a utility subject to the jurisdiction of a regulatory commission or commissions or other regulatory authority or authorities, created by the laws of the State or States in which the properties of the debtor are operated, a plan of reorganiza-

tion shall not be confirmed until (a) it shall be submitted to each such commission or authority having regulatory jurisdiction over the debtor, (b) an opportunity shall be afforded each such commission or authority to suggest amendments or objections to the plan, and (c) the judge shall consider such amendments or objections at a hearing at which each such commission or authority may be heard. In case the debtor is a public utility corporation wholly intrastate in character, no court shall approve any plan of reorganization if the regulatory commission of such State having jurisdiction over such public utility certifies that the public interest is affected by said plan, unless said regulatory commission shall first approve of said plan as to the public interest therein and the fairness thereof."

It seems clear that a contract which affects the public interest, or is in the public authority, may not be authorized to be rejected by the debtor, particularly where the debtor is a public utility corporation wholly intrastate in character subject to the jurisdiction of a State regulatory commission, until after such rejection has had the approval of the State Commission.

The court below refused to accept this view and it is respectfully submitted that its refusal so to do was error.

The Ordinance and Contract of This Lease Are Clearly "In the Public Authority."

The federal statutes are as follows:

Chandler Act, Chapter X, Sec. 116 (U. S. C. A., Title 11, Sec. 516).

Chandler Act, Chapter X, Sec. 216 (U. S. C. A., Title 11, Sec. 616).

Section 77B, 77B, subsections (b)(6) and (c)(5), Bankruptcy Act (U. S. C. A., Title 11, Sec. 208).

These are the sections of the federal bankruptcy statute which petitioner believes were intended to avoid conflict

between the bankruptcy power of the federal courts and the power of the public authorities of the forty eight states over matters of purely intrastate commerce. They forbid the rejection of contracts "in the public authority."

Chapter X, Section 116 (U. S. C. A., Title 11, Section 516):

> "Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon him and the court (1) permit the rejection of executory contracts of the debtor, *except contracts in the public authority.*" (Italics ours.)

Section 216 of Chapter X of the Chandler Act (U. S. C. A., Title 11, Section 616) provides:

> "A plan of reorganization under this chapter • • • (4) may provide for the rejection of any executory contract *except contracts in the public authority.*" (Italics ours.)

The ordinance of the City of Chicago (R. 413), granted petitioner authority to construct an elevated railroad solely "upon the express condition that said elevated railroad • • • shall from its completion be permanently operated by said South Side Elevated Railroad Company under lease or other arrangement between the said two companies as a part or parcel of the road of said South Side Elevated Railroad Company". It was part of the track elevation ordinances of the City of Chicago; was adopted March 16, 1903; and was in itself a comprehensive program which required the elevation of railroad tracks of the Union Stock Yard & Transit Company of Chicago, the Chicago & Western Indiana Railroad Company, the Pittsburgh, Fort Wayne & Chicago Railway and its lessee the Pennsylvania Company, the Chicago, Rock Island & Pacific Railway Company, the Lake Shore & Michigan Southern Railway Company, among others, for the separation of the grades of streets and railroad tracks at street crossings throughout the city, all for the safety and benefit of the public.

The rights and privileges granted by the ordinance to the Chicago Junction Railroad Company to construct and maintain its elevated railroad were upon the express condition and agreement that the elevated road authorized to be constructed should, from its completion, be permanently operated by the South Side Elevated Railroad Company under lease or other arrangement between the said two companies as a part and parcel of the road of the South Side Elevated Railroad Company, a going elevated road in the City of Chicago; and the South Side Elevated accepted this condition.

When the South Side Elevated road consolidated with other elevated railroads of Chicago to form the Chicago Rapid Transit Company on January 8, 1924, this was pursuant to the laws of the State of Illinois (R. 22).

When the respondents here filed a petition for the reduction of rent on May 13, 1937 (R. 21) they recited in the petition that "your petitioner serves the public convenience and necessity of large numbers of persons within the City of Chicago, Illinois, and adjacent suburbs within the State of Illinois; * * * that your petitioner cannot serve such public convenience and necessity at its present efficiency if your petitioner is required to pay the rentals now due", etc. (R. 24).

When the Court entered its order approving the filing of a petition for reorganization it authorized respondents "to continue with the supplemental proceedings now pending before the public utilities regulatory commission of the State of Illinois" (R. 15).

The City of Chicago retains control over the use of its streets, and unless operation is continued over respondent's lines by the Chicago Rapid Transit Company, or by respondents, the franchise granted by the ordinance of March 16, 1903 will terminate. (*City of Geneseo* v. *Illinois Nothern Utilities Company,* 378 Ill. 506.)

The leasing of lines of railway of one carrier by another is so affected with the public interest that such leases cannot be entered into without the approval of the Illinois Commerce Commission. Nor can they be operated or abandoned by the lessee without the consent and approval of the Illinois Commerce Commission. Rejection by respondents of petitioner's lease would ordinarily result in the abandonment of operations over petitioner's structure.

It seems clear from this background, from these statutory provisions, and from these authorities, that this lease from petitioner to respondents' predecessor is a lease "in the public authority" and as such may not under the law be amended or rejected, except with the approval of the Illinois Commerce Commission.

Conclusion.

It is respectfully submitted that in the matters presented by this petition, the judgments of the courts below were erroneous and should be corrected by this court.

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